Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

82-744

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

ON APPEAL FROM THE APPELLATE DIVISION OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

JOHN P. MacARTHUR
Attorney for Appellant
284 State Street
Albany, New York 12210

October 18, 1982

QUESTIONS PRESENTED

May a state deny a petitioner judicial hearing and review of a claim that her constitutional rights were violated by an order of an administrative board, particularly where that order required that petitioner expend substantial sums of money to alter her real property?

May a town zoning board of appeals act upon the petition of a neighbor, filed after the expiration of the time limit provided by statute and after the completion of construction, upon the deciding vote of another neighbor who is also a member of the board, to require a property owner to demolish a fence recently constructed pursuant to a town permit?

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ON APPEAL FROM THE APPELLATE DIVISION OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

INTRODUCTION

Appellant appeals from the Order of the New York State Court of Appeals entered on July 23, 1982, denying Appellant's motion for leave to appeal to that Court from an Order of the

Appellate Division of the Supreme Court, Third Judicial Department, entered on April 28, 1982, which Order affirmed an Order of the Supreme Court of the State of New York in and for the County of Schenectady, New York, directing Appellant to remove certain fences on her premises, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The New York State Court of Appeals wrote no opinion. The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, is reported at 87 A.D.2d 932 (3d Dept., 1982). The opinion of the Supreme Court of the

State of New York is not reported. Copies of the opinion and the Orders of the three New York State Courts are attached hereto as Appendices A-1 through A-3.

JURISDICTION

A. Statement

This proceeding was brought pursuant to N.Y. Civ. P.L.R. §7801 (the relevant portion is attached hereto as Appendix B-1), seeking review of an Order of Appellees directing Appellant to remove certain fences on her premises, on the ground that this Order violated Appellant's rights under the "due process" provisions of U.S. Const. amend. XIV, §1, and was thus unconstitutional and void. It is brought to this Court on the

ground that to deny Appellant the right to judicial review of that question was itself a violation of Appellant's due process rights, as well as on the original ground.

B. Order

The order of the New York State Supreme Court, Schenectady County, was entered on December 8, 1980; Notice of Appeal was filed on January 5, 1981, to the Appellate Division of the Supreme Court of the State of New York, the Order of which court was entered on April 28, 1982; leave to appeal therefrom was sought by motion to the New York State Court of Appeals; that court's order denying the motion was entered on July 23, 1982. Notice of Appeal was filed in the Appellate Division and the New York State Supreme Court on August 18, 1982.

C. Jurisdiction of Appeal

The jurisdiction of the Court to review this decision by direct appeal in conferred by 28 U.S.C. §1257(2).

D. Authorities Supporting Jurisdiction

The following decisions sustain the jurisdiction of the Supreme Court to review the order on appeal in this case:

Lawrence v. State Tax Commission, 286 U.S. 276

Live Oak Ass'n v. Railroad Commission, 269 U.S. 354

Virginia v. Imperial Coal Sales Co., 293 U.S. 15

Diamond National Corp. v. State Board of Equalization, 425 U.S. 268

Mergenthaler Linotype Co. v. Davis, 251 U.S. 256

STATUTES INVOLVED

Copies of portions of the Civil Practice Law and Rules of the State of New York and of the Zoning Law of the Town of Niskayuna, New York, are attached hereto as Appendices C-1 and C-2, but the principal statute involved is the "due process" portion of Section 1 of the 14th Amendment to the Constitution of the United States, attached as Appendix B.

STATEMENT OF THE CASE

A. The Parties

Appellant owns a residence in the Town of Niskayuna, Schenectady County, New York. Appellees are the Niskayuna Zoning Board of Appeals. There appear to be no disputed questions of fact. At issue are the validity of portions of the local zoning ordinance and the state statute governing judicial review of administrative orders.

B. How the Federal Questions Are Presented

The federal questions sought to be reviewed in connection with the zoning ordinance were raised in the petition in the court of first instance. Those relating to the state statute governing review were raised on appeal to the first appellate level. They were briefed by the parties and urged

in oral argument, but not explicitly considered by the court in its opinion.

No new questions are raised here.

C. How They Were Passed Upon

By implication, the constitutiional questions were decided in favor of Appellees, whose order was affirmed.

D. The Facts

Appellant, who owns a residence in the Town of Niskayuna, New York, filed (with the local building inspector) an application for a permit to fence her back yard; the appropriate fee therefor was paid; a permit was issued; and the fence was constructed pursuant thereto. The local zoning ordinance provides for review of the issuance of a permit "within thirty days". More than thirty days after the fence was completed, several months after the permit was issued, a neighbor

sought review before the local Board, Appellee herein.

The Board met three times. After the first it ordered removal of the top two feet of fence; another neighbor who sits on the Board participated in the discussion but abstained from voting. After the second, the matter was adjourned. After the third, the Board (by a one-vote margin) ordered removal of the rest of the fence, the swing vote being that of the previously abstaining neighbor. The ground upon which removal was ordered was that the local law permitted only two "accessory structures", which were already on the premises; that the fence constituted an additional "accessory structure"; and that the permit had therefore been improvidently granted.

Pursuant to New York State

statute, Appellant sought judicial review of those orders on a number of grounds, including impropriety of the voting, laches, the statute of limitations, the misapplication of the designation "accessory structure" to a fence, and other grounds, alleging deprivation of property in violation of the "due process" clauses of the State and Federal constitutions. The Court heard argument in chambers on the statute of limitatations question, heard no other questions either in chambers or in open court, and sustained the Board's order. Appeal to the New York State Appellate Division resulted in affirmance, and permission to appeal to the Court of Appeals was denied.

The notion of a review of record of the proceedings below is itself

misleading; there is no "record", in the usual sense, because there was no "proceeding". No witness was ever sworn, no hearing was held. It was simply a matter of glossing over a little local illegality and corruption, to the benefit of several people and the detriment of only one, precisely what occurs whenever an undesireable citizen is incarcerated through illegal procedure, except that (thanks largely to this Court) it has become legitimate to question the unconstitutional acts of a sovereign in criminal cases. This is not a criminal case; but it has already fostered, and will continue to foster, a spreading decay in the local judicial process. None of the foregoing facts are disputed.

The result is that Appellant, having expended several thousand

dollars to construct a fence pursuant to a permit is now ordered to demolish it at her own additional cost, as the result of a late-brought proceeding, a vote by a public officer interested in the outcome, and no judicial review of any of the constitutional or other questions raised. The various statutes and ordinance involved are typical of those which apply not only across the State of New York, but throughout the nation. The amount of money damage in this one case is relatively small, but the invasion of right is great and the potential application of this proceeding to other cases is incalculable.

Appellees have never taken issue with any of this. They argue only that the interested neighbor, as a duly appointed member of the Board, had a

right to vote on any question brought before it; that there was no statutory right to a hearing on questions of law; and that the questions of fact were not dispositive of the issue anyway. By this theory, of course, the entire appellate function of this Court, and all others of appellate jurisdiction, becomes a trivial act of sovereign grace, and not a matter of right at all.

ARGUMENT

A. The Statutes at Issue

At issue is the validity of a New York State statute which has to do with review of administrative decisions, replacing the old writs of certiorari and mandamus. According to its terms, an aggrieved party is entitled to a "hearing" (the word is used several times; see Appendix C-1); as

interpreted, however, an aggrieved party is permitted to present neither witnesses nor other evidence with respect to disputed questions of fact, and is permitted neither oral argument nor the submission of briefs or memoranda on disputed questions of law.

To the extent that this result may be said to flow from the provision of the rules adopted by, and governing the practice of, the Zoning Board of Appeals of the Town of Niskayuna, New York, to the effect that its decisions are final and binding, the validity of that rule is also here at issue (see Appendix C-2).

B. The Due Process Questions are Substantial

1) Persons affected.

The statute at issue governs judicial review of administrative decisions of every kind within the

State of New York. Such review is sought in thousands of instances each year, both by natural persons and by corporations and other enterprises, and the rights of all such petitioners are directly affected by the decision herein. The amount of money involved in the totality of such proceedings is incalculable.

Of perhaps greater importance, although it is difficult to measure the extent thereof, is the impact of this decision in other jurisdictions. Substantially every jurisdiction in the country -- local state and federal alike -- provides in its rules and statutes for judicial review of administrative decisions. For a number of reasons, principally relating to the fact that the State of New York is regarded as a sophisticated

jurisdiction, the procedural rules of which have been particularly carefully drafted, New York is often looked to as a model by other states and political subdivisions in the preparation of their own statutes. Indeed, the statutes of many jurisdictions in this regard are essentially identical.

Thus, although the question here presented directly affects only persons and enterprises resident i he State of New York, it indirectly affects every citizen of the United States.

The special problem presented here is that because the law is so clearly and obviously against Appellees, it is tempting to conclude that the case is a freak; that no other court would ever follow it; that therefore the only person who will in fact be irreparably injured is Appellant; and that this

Court has more important things to do than to safeguard the rights of a single person, no matter how grossly they have been violated. To this view it can only be responded that, freak or no, it has been produced in the face of an apparently reasonable statute by the courts of a major state; that lower courts are bound to accept it as authority; and that it is a part of the business of the law to protect the fundamental rights of persons against patent outrage by their own governments.

2) The situation presented here is novel

The effect of the decision herein is particularly broad and important because it is novel. Prior authority exists with respect to situations involving no review at all, or broad review of both questions of fact and law, but Appellant has been unable to

find a single case in which questions of both law and fact were presented and review was limited to in-chambers argument on a single point, the statute of limitations.

An opportunity for a hearing by an impartial tribunal is an essential element of due process; Iron Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463, 49 L.Ed. 836, 25 S.Ct. 474; Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697; Parratt v. Taylor, 68 L.Ed.2d 420, 101 S.Ct. 1908. There was no such opportunity afforded Appellant before the Zoning Board of Appeals, where the decision turned upon the vote of an interested and partial neighbor and was grounded upon a series of erroneous assumptions of law and fact which Appellant had no opportunity to contest or rebut.

There was no such opportunity afforded Appellant before the Court, which allowed no testimony, other evidence or argument upon questions of fact and no evidence or argument upon any questions of law except for one: the timeliness of the commencement of the proceeding before the Board.

Appellant has a constitutional right to present her defenses; Lindsey v. Normet, 405 U.S. 56, 31 L.Ed.2d 36, 92 S.Ct. 862; American Surety Co. v. Baldwin, 287 U.S. 156, 77 L.Ed. 231, 53 S.Ct. 98. Indeed, her objection to the vote cast by the interested member of the Board (itself a violation of her constitutional rights; Nebraska Press Asso. v. Stuart, 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791; Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163; Withrow v. Larkin, 421

U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456, particularly where the interest was large and pecuniary; Withrow v. Larkin, supra, which did not occur until after the Board proceedings were concluded) could not be presented anywhere but to the reviewing Court; there was no other possible forum, a situation envisaged in Lindsey v. Normet, supra., p. 20.

Appellant had a constitutional right to introduce evidence; Baltimore O.R. Co. v. United States, and to judicial findings thereon; Id. This was a case of not even allowing an opportunity for such a proffer to be made, oral or written. There was no opportunity to confront or cross examine witnesses; Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011, or even to argue questions of law explicitly raised by the pleadings.

Of the various legal encyclopedias (e.g. 16A AmJur 2d, Due Process of Law, §§804 et seq., esp. §839, 841, 843), which collect authorities on the questions here presented from the various jurisdictions, not a single authority to the contrary of the positions urged by Appellant herein can be found. So far as Appellant has been able to determine from all other sources, none exist anywhere. The requirement of a hearing is universal. The requirement that it be before a disinterested tribunal is universal. The requirement that it be broad enough in scope to permit an aggrieved party to present and have considered all legitimate factual and legal defenses is universal. Only in this case is the opposite view adopted.

And this is much more obvious than simply taking Appellant's land without a hearing. Appellant is further required to expend her own funds to an unspecified extent to facilitate this taking. The Town is not paying for this process; it is requiring Appellant to do so, and has instituted contempt proceedings to enforce its will.

If this were a proceeding in the nature of eminent domain, or one to require abatement of a nuisance, or one involving the invocation of a sovereign's emergency power, it would at least be arguable that a legitimate sovereign interest was involved. But no such elements are involved here. This is a case of a neighbor, on a claim that a fence reduced property values in a neighborhood, and that

the permit to construct it was thus improvidently granted, ruling in an official capacity that it must be demolished at the builder's expense, and whatever else that may imply it does not imply a legitimate sovereign interest. This is not even a "negative order"; it is an affirmative one, of unlimited extent.

This is not a question of trial de novo; one cannot try anew that which was never tried in a first trial. This does not involve "substantial evidence", "credible" evidence, a "residuum" of evidence, "competent" evidence or any "evidence" at all.

It is not a question of discretion, or propriety, or wisdom, or judgment, or reasonableness. It is not only a question of whether the Order was right or wrong in any ultimate

philosophical sense, but also a question of how it was engendered.

This is simply a case of a person forcing his neighbor to expend money to his own financial benefit by causing a board upon which he sits to issue such an order. That is not a government of law; it is an intolerable government of persons, acting in official capacities to further personal ends; Jones v. Securities and Exch. Comm., 298 U.S. 1, 80 L.Ed. 1015, 56 S.Ct. 654.

CONCLUSION

For all of these reasons, it is respectfully urged that the questions presented here are substantial and of public importance.

Respectfully submitted,

JOHN P. MacARTHUR
Attorney for Appellant
284 State Street
Albany, New York 12210

APPENDIX A-1

ORDER OF THE NEW YORK STATE
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second day of July A.D. 1982

Present: Hon. Lawrence A. Cooke,
Chief Judge, Presiding

3 Mo. No. 671

In the Matter of Marilyn L. Cowger, Appellant,
vs.
Charles Mongin & Ors, constituting the Zoning Board of Appeals of the Town of Niskayuna, New York, Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

Filed with Sch. Co. Clk. 7/23/82

/s/ P.L.R.

APPENDIX A-2, p. 1

ORDER APPEALED FROM

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 15th day of March, 1982.

PRESENT:
HON. FRANKLIN MAHONEY,
Presiding Justice
HON. MICHAEL E. SWEENEY
HON. JOHN T. CASEY
HON. ANN T. MIKOLL
HON. HOWARD A. LEVINE,
Associate Justices.

(Same Title)

Marilyn L. Cowger, Petitioner-Appellant, having appealed from a Judgment of the Supreme Court held in and for the County of Schenectady, entered on the 9th day of December,

1980, in the Office of the Clerk of the County of Schenectady, and said appeal having been presented during the above-stated term of this Court, and having been argued by John P. MacArthur, Esq., attorney for the Appellant, and Paul L. Ryan, Esq., attorney for the Respondents, and, after due deliberation, the Court having rendered a decision on the 22nd day of April, 1982, it is hereby

ORDERED, that the Judgment so appealed from be and hereby is affirmed, without costs.

ENTER:

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: April 28, 1982.

A TRUE COPY

/s/ John J. O'Brien
Clerk

SUPREME COURT, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

April 22, 1982 41732

(Same Title)

Appeal from a judgment of the Supreme Court at Special Term (Cerrito, J.), entered December 9, 1980 in Schenectady County, which, inter alia, dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to annul a determination of the Zoning Board of Appeals of the Town of Niskayuna.

On June 8, 1979, petitioner obtained a building permit allowing her to construct two fences on her property in the Town of Niskayuna. Construction of the fences commenced in October, 1979. A neighbor of petitioner registered a complaint concerning the fences with the Town Board of the

Town of Niskayuna on November 20, 1979 and was told to attend a meeting of the Town of Niskayuna Planning Board and Zoning Commission on December 3, 1979. He attended that meeting and was told that he could not obtain the relief he sought before the planning board. Consequently, on December 6, 1979, the neighbor filed an appeal with the zoning board of appeals challenging the issuance of the building permit to petitioner. The board reserved decision on the appeal but ordered petitioner to remove the barbed wire on one of the fences within 30 days. In February, 1980, the Town of Niskayuna commenced an action against petitioner seeking the removal of the barbed wire. At a meeting of the board held on February 7, 1980, it was decided that the fences were accessory structures; that petitioner already had two accessory structures on her property; and that the fences

were constructed in violation of the town zoning ordinance which permits only two accessory structures per residential lot. The building permit was therefore ruled invalid and petitioner was ordered to remove the fences. This article 78 proceeding was then commenced seeking annulment of the board's determination. Special Term dismissed the complaint of the Town of Niskayuna as moot, dismissed petitioner's application, and ordered that the fences be removed by petitioner. This appeal ensued.

Petitioner maintains that the appeal by her neighbor to the zoning board of appeals was untimely. The relevant rule provides that an appeal must be made within thirty (30) days of the action of the administrative

official appealed from" (General Governing Rules, Zoning Board of Appeals of the Town of Niskayuna, §5.1.2). In situations such as the present one, however, where a person demands revocation of a permit issued to another, an appeal should not be required until his demand for revocation has been rejected with some formality and finality (Matter of Pansa v. Damiano, 14 N.Y.2d 356). Applying a liberal construction to the applicable rule in the instant case as the court did in Pansa and considering the circumstances surrounding the appeal, we conclude that the appeal was timely.

Section 5.7.1.1 of article V of the Town of Niskayuna Zoning Ordinance permits only two accessory structures

per residential lot. Petitioner does not dispute that at the time she obtained the building permit she had two accessory structures on her property. She does argue, however, that the board incorrectly determined that the fences were accessory structures. In this regard it is to be noted that the construction given an ordinance by a zoning board should be upheld if not irrational or unreasonable (Matter of Delles v. Cooper, 55 A.D.2d 244, 245-246). An "accessory structure - minor" is defined as "detached accessory buildings or other structures one hundred and twenty (120) square feet or less in area" (Town of Niskayuna Zoning Ordinance, art. II). Fences are by definition included as structures (id.). Section 5.7.1.2-B of article V

of the ordinance provides that "No minor accessory structure other than fences, shall be located within five (5) feet of the side or rear lot lines" (emphasis added). Upon consideration of these pertinent provisions of the zoning ordinance, we are of the opinion that the board's determination that fences are accessory structures is rational and reasonable and, therefore, should not be disturbed.

Petitioner also contends that the town should be estopped from invalidating the building permit she obtained due to her reliance on the permit in constructing the fences. We disagree. An invalid permit vests no rights in contravention of a zoning ordinance in the person obtaining that permit (see Matter of B & G Constr. Corp. v. Board

of Appeals of Vil. of Amityville, 309 N.Y. 730; Rollins v. Armstrong, 226 App. Div. 752, affd. 251 N.Y. 349). Accordingly, the town was not estopped from enforcing its zoning ordinance under the present circumstances (see Anderson, N.Y. Zoning Law and Practice [2d ed.], § 6.09, pp. 178-181). We have considered petitioner's remaining arguments and find them unpersuasive. The judgment must be affirmed.

Judgment affirmed, without costs.

MAHONEY, P.J., SWEENEY, CASEY, MIKOLL and LEVINE JJ., concur.

APPENDIX A-3, p. 1

ORDER AND OPINION OF THE COURT BELOW

STATE OF NEW YORK
SUPREME COURT
COUNTY OF SCHENECTADY

(Same Title) ORDER

PRESENT: HONORABLE D. VINCENT CERRITO,
Justice of the Supreme Court
State of New York

Upon reading and filing the Petition of Marilyn L. Cowger, verified the 12th day of March, 1980, demanding the reversal and annulment of a decision of the Zoning Board of Appeals of the Town of Niskayuna, New York; the Answer to said Petition by Paul L. Ryan, on behalf of Respondents, verified April 28, 1980, praying for dismissal of said Petition and for an Order compelling Petitioner to remove the fences at 867 Hereford Way in the Town of Niskayuna, in compliance with the decision of said Zoning Board of

Appeals; together with all the affidavits, minutes and documents submitted in connection therewith, and

ALSO, upon reading and filing a Summons and Complaint by the Town of Niskayuna against Marilyn L. Cowger, dated February 7, 1980, together with an Order to Show Cause based thereon, dated February 9, 1980, demanding removal of barbed wire from an eight-foot fence at 867 Hereford Way; an Answer in opposition thereto, dated February 22, 1980; and a Reply dated February 28, 1980; and

After hearing John P. MacArthur, Esq. attorney for Petitioner, in support of said Petition, and Paul L. Ryan, Esq., attorney for the Respondents, in opposition thereto, and due deliberation having been had on all

matters before the Court in this proceeding, I find that the determination of the Zoning Board of Appeals of the Town of Niskayuna, New York, has a rational basis,

NOW, on motion of Paul L. Ryan, attorney for the Respondents, it is

ORDERED, that the Petition herein be, and it hereby is, dismissed, and it is further

ORDERED, that the Complaint and Order to Show Cause referred to above also are dismissed, having been rendered moot by my decision, and it is further

ORDERED, that Petitioner is hereby directed to remove, within 30 days, the two fences on her premises at 867 Hereford Way, in compliance with the decision and order of the Zoning Board

of Appeals of the Town of Niskayuna, New York, duly made in session on February 7, 1980, that said fences be removed.

Dated: Dec. 8, 1980

Enter:

/s/ D. Vincent Cerrito
HONORABLE D. VINCENT CERRITO
Justice of the Supreme Court
State of New York

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

(Same Title)

APPEARANCES: John P. MacArthur
for petitioner,

Paul L. Ryan, Town
attorney for respondents.

CERRITO, J. On June 8, 1979, the Town of Niskayuna issued a building permit to petitioner allowing her to construct two fences on her property. One fence to be about four feet high and situated on the property line. The other set back two or three feet from the property line and eight feet high with a two foot overhang of barbed wire atop it. Construction of these fences began in the early part of October 1979 and was substantially completed by the end of that month.

Because of the erection of

an industrial type security fence in a residential area, petitioner's neighbors registered complaints with the Town Planning Board on November 19, 1979 and the Town Board on November 20, 1979. On December 6, 1979, an appeal of the building inspector's issuance of the permit was filed with the Zoning Board of Appeals (ZBA).

That body first considered this matter at its December 28, 1979 meeting. There was a considerable discussion which resulted in a direction from the ZBA that the barbed wire be removed from the eight foot fence within 30 days. The petitioner did not comply with this direction, so the Town has moved before this court for an order directing her to remove the barbed wire and enjoining her from maintaining

any barbed wire on the fence.

The ZBA next considered this appeal at its January 17, 1980 meeting. Again there was an extended discussion with the ZBA voting to postpone action on the appeal in order to obtain advice from the New York State Department of State as to whether a fence is an "accessory structure" under the terms of the Town's Zoning ordinance.

This was the critical issue before the ZBA since the zoning ordinance only permits two accessory structures per residential lot (Niskayuna, N.Y., Zoning Ordinance, Art. V, section 5.7.1.1). At the time petitioner applied for the permit in June, 1979, her lot already contained two such structures. Consequently, if fences were considered "accessory structures",

the permit should not have been issued for with the addition of the two fences petitioner's lot would contain four accessory structures.

At its February 7, 1980 meeting the ZBA decided that fences were "accessory structures" and ordered petitioner to remove her two fences as they were in violation of the zoning ordinance. This Article 78 proceeding, instituted by the petitioner, ensued.

The first issue which petitioner raises is the timeliness of the appeal to the ZBA. Under its General Rules, an appeal must be made to the ZBA within 30 days of the administrative action complained of (General Governing Rules, Zoning Board of Appeals of the Town of Niskayuna, section 5.1.2).

When persons other than the permittee are appealing the grant of a permit, the 30 day period does not begin to run from the date of the issuance of the permit but from the time these persons had notice of the building inspector's actions provided there has been no element of undue delay or laches (see, Mtr. of Pansa v Damiano, 14 NY2d 356; Mtr. of Cave v Zoning Bd. of Appeals of Vil. of Fredonia, 49 AD2d 228; Highway Displays v Zoning Bd. of Appeals of Town of Wappinger, 32 AD2d 668).

Petitioner's neighbor, the appellant before the ZBA, should have had notice of the building inspector's action in the latter part of October, 1979 since that was when the fences were substantially completed. Thus,

if the ZBA's General Rules are applied literally, this appeal is time barred as it was formally commenced 30 days after the appellant had notice. However, due to the informal character of board procedure, courts do not rigidly apply the general rules of zoning boards (see, Anderson, N.Y. Zoning Law and Practice, section 20.06, 2nd ed.).

Under the circumstances of this case, I find the appeal to the ZBA to have been timely. The appellant registered his complaints with the various town boards well within the 30 day period and promptly filed an appeal with the ZBA after receiving the advice to do so at the Town Board's November 20th meeting. Furthermore, petitioner has not shown any actual

prejudice accruing to her from appellant's inconsequential delay.

When reviewing the decision of zoning officials, the court's role is limited. It may not substitute its judgment for that of the zoning board and must sustain the board's determination as long as it is not arbitrary or contrary to law (see, Mtr. of Campus v Delany, 62 AD2d 990; Mtr. of Davison v. Segur, 24 AD2d 797).

Whether the decision here has a rational basis depends upon whether under the terms of the zoning ordinance a fence can be considered an "accessory structure".

The ordinance defines an "accessory structure - minor" as "detached accessory buildings or other structures one hundred and twenty (120)

square feet or less in area" (Niskayuna, N.Y. Zoning Ordinance, Art. II). The term "other structures" is not defined so in order to ascertain its meaning reference must be made to the ordinance's definition of "structure". That reads: "A combination of materials forming a construction that is safe and stable and includes among other things, platforms, radio and television towers, trestles, bridges, piers, sheds, storage bins, walls, fences and display signs." (emphasis supplied)(Niskayuna, N.Y., Zoning Ordinance, Art. II). Since fences are included within the definition of "structures", it is logical to assume that they are likewise included within the term "other structures".

This assumption is supported

by the language of section 5.7.1.2.B of the ordinance which reads: "no minor accessory structure other than fences, shall be located within five (5) feet of the side or rear lot lines." (emphasis supplied). The inclusion of the phrase "other than fences" clearly demonstrates that the drafters of this ordinance considered fences to be accessory structures. If they considered them not to be, then the inclusion of such phrase would have to be considered to be mere surplusage. That would be an improper consideration because it cannot be presumed that the inclusion of the phrase was without any purpose or view (McKinney's Statutes, section 231).

Accordingly, as an interpretation of the zoning ordinance supports the

ZBA's position that fences are accessory structures, I find that its determination herein has a rational basis. Therefore, I will dismiss the petition. The respondents' order to show cause is also dismissed since it is rendered moot by this decision.

Respondents to submit order.

Dated: November 25, 1980

/s/ D. Vincent Cerrito
D. Vincent Cerrito
J.S.C.

APPENDIX B

THE CONSTITUTION OF THE UNITED STATES

Amendment 14

Section 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

NEW YORK STATE
CIVIL PRACTICE LAW AND RULES

ARTICLE 78

Proceeding Against Body or Officer

§7801. Nature of Proceeding

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer

or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

§7804. Procedure

(a) Special Proceeding . . .

(c) Time for service of notice of petition and answer. Unless the court grants an order to show cause to be served in lieu of a notice of petition at a time and in a manner specified therein, a notice of petition,

together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least five days before such time. A reply, together with supporting affidavits, if any, shall be served at least one day before such time . . .

(g) Hearing and determination; transfer to appellate division. Where an issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall make an order directing that the proceeding be

transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced; the court may, however, itself pass on objections in point of law. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding.

(h) Trial. If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith. Where the proceeding was transferred to the appellate division, the issue of fact shall be tried by a referee or at a trial term of the supreme court and the verdict, report or

decision rendered after the trial shall be returned to, and the order thereon made by, the appellate division. (emphases supplied)

ZONING LAW
TOWN OF NISKAYUNA, NEW YORK

Zoning Board of Appeals
Town of Niskayuna
Schenectady County, New York

GENERAL GOVERNING RULES

8.6.3 CERTIFICATION OF DECISION. A certified copy of the board's decision including all terms and conditions shall be transmitted to the municipal administrative official and shall be binding upon and observed by him and he shall fully incorporate such terms and conditions of the same in the permit to the applicant or appellant whenever a permit is authorized by the board.

Section 11.5 FURTHER RECOURSE

Any person, or persons, jointly or severally aggrieved by any decision of the Zoning Board of Appeals, or by

any officer, department, board of bureau of the town, may apply to the Supreme Court for review by a proceeding under Article 78 of the Civil Practice Law and Rules and as provided in Section 267 of Town Law.

Such proceeding shall be instituted within thirty (30) calendar days after the filing of a decision in the office of the Town Clerk.

IN THE

APPELLATE DIVISION

OF THE STATE OF NEW YORK

IN AND FOR THE

THIRD JUDICIAL DEPARTMENT

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

John P. MacArthur
Attorney for Appellant
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IN THE

APPELLATE DIVISION

OF THE STATE OF NEW YORK

IN AND FOR THE

THIRD JUDICIAL DEPARTMENT

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Marilyn L. Cowger, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Division, Third Judicial Department,

of the State of New York, entered in this action on the 28th day of April, 1982 and affirming the judgment of the Supreme Court of the State of New York in Schenectady County entered December 9, 1980.

This appeal is taken pursuant to U.S.C. § 1257(2).

John P. MacArthur
Attorney for Appellant
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(518) 465-4784

IN THE

APPELLATE DIVISION

OF THE STATE OF NEW YORK

IN AND FOR THE

THIRD JUDICIAL DEPARTMENT

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 1982, copies of this Notice of Appeal were mailed, postage prepaid to Paul L. Ryan, Esq., on behalf of Charles Mongin, Richard S. Arthur, Harold N. Armstrong, Richard

M. Gershon and Paul S. Marble, constituting the Zoning Board of Appeals of the Town of Niskayuna, New York, The Clerk of the Supreme Court, County of Schenectady and John J. O'Brien, Clerk, New York Supreme Court, Appellate Division, Third Department.

I further certify that all parties required to be served have been served.

John P. MacArthur
Attorney for Appellant
284 State Street
Albany, New York 12210
(518) 465-4784

Office-Supreme Court, U.S.
FILED
DEC 10 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

DOCKET NO. 82-744

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

ON APPEAL FROM THE APPELLATE DIVISION OF THE STATE OF NEW YORK

MOTION OF APPELLEES

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

DOCKET No. 82-744

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

ON APPEAL FROM THE APPELLATE DIVISION OF THE STATE OF NEW YORK

MOTION TO DISMISS THE MATTER IN THE SUPREME COURT OF THE UNITED STATES, OR IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE NEW YORK STATE COURT OF APPEALS, WHICH DENIED A MOTION FOR LEAVE TO APPEAL.

Appellees, by their attorney, hereby make a motion praying that the Supreme Court of the United States dismiss this matter, or in the alternative, affirm the decision of the New York State Court of Appeals, which denied Appellant's motion for leave to appeal.

The ground for Appellees' motion herein is that there is no substantial Federal question presented.

In the Jurisdictional Statement, Appellant's attorney has made an impassioned plea that Appellant's Constitutional rights were infringed upon and that she was not afforded "due process" of law. Appellees contend that such assertions are wholly without foundation.

For the first time since this proceeding began three years ago, Appellant has stated in her Jurisdictional Statement

that the hearings before the Zoning Board of Appeals of the Town of Niskayuna, New York, were unsatisfactory to her.

This cannot be so. The Town Law of the State of New York and the Zoning Ordinance of the Town of Niskayuna, New York, both require the Zoning Board of Appeals to conduct a public hearing on a matter before it. In this instance the public hearing was spread over three evenings, and at each session the attorney for Appellant was granted unlimited opportunity to speak and to present evidence.

Appellant, in the Jurisdictional Statement, has further contended that her Constitutional rights were denied by lack of a hearing before the New York State Supreme Court.

Appellant, in 1980, appealed the decision of the Zoning Board of Appeals to the

said New York State Supreme Court pursuant to a proceeding provided for in Article 78 of the New York Civil Practice Law and Rules. Included in the statute, at Section 7804(h), is provision for a trial if a triable issue of fact is raised.

The facts were not in dispute in this instance. It has been agreed by both parties that Appellant obtained a permit from the Town of Niskayuna to erect two fences on her real property in a residential neighborhood; one fence, about four feet high, is on the boundary line; the other fence, about eight feet high and topped with two feet of barbed wire, is located about three feet behind the first fence. A neighbor, claiming to be aggrieved, commenced action before the Zoning Board of Appeals, claiming that the permit for the fences should not have been issued because they added to the

"accessory structures" already located in the yard to a degree that was in violation of the Zoning Ordinance.

The Zoning Board of Appeals agreed, and ordered the fences removed.

None of those facts is in dispute. Appellant's Jurisdictional Statement concurs in that. (We do disagree with the editorializing by Appellant's attorney on page 12 of the Jurisdictional Statement, wherein he referred to "a matter of glossing over a little local illegality and corruption,...")

Inasmuch as the facts were not in dispute, there was no need under Article 78 for further trial or hearing. The responsibility of the Supreme Court Justice was to make a determination on the record. This he did.

His decision confirming the action of the Zoning Board of Appeals was upheld

unanimously by the Appellate Division of the New York Supreme Court, Third Judicial Department. As was stated above, the New York State Court of Appeals later denied a motion for leave to appeal.

In the Jurisdictional Statement, Appellant contends that a homeowner living in the same general area as Appellant, and who also was a member of the Zoning Board of Appeals, should not have participated in this matter as it was brought before the Board.

The man in question had served as a member of the Board for several years, and the fact that he lived nearby would not disenfranchise him. If such were the case, then no resident of the Town could serve on the Board, inasmuch as matters before the Board relate to property in the Town of Niskayuna; there is no requirement that a Board member live

any special distance from the property of any individual case. The man in question was not the appellant, nor was it his property that was involved; he had no personal interest in the matter which would disqualify him.

It should be pointed out also that the original Petition to the New York Supreme Court in the Article 78 proceeding made no metion of the position of the above-described Board member. Therefore, it is Appellees' contention that any question about his capacity is untimely.

WHEREFORE, Appellees move for dismissal of the matter in the Supreme Court of the United States, or in the alternative, for affirmation of the decision of the New York State Court of Appeals, which denied a motion for leave to appeal.

Respectfully submitted,

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December 7, 1982